



L. Kinnamura

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fourth Corner Forestry, Inc.

File: B-226438

Date: April 27, 1987

DIGEST

1. A bidder bears the risk of not receiving invitation amendments unless it is shown that the contracting agency made a deliberate effort to exclude the company from competing.

2. The failure to acknowledge an IFB amendment increasing wage rates cannot be cured after bid opening by a bidder whose employees are not already covered by a collective bargaining agreement binding the firm to pay wages not less than those prescribed by the Secretary of Labor.

DECISION

Fourth Corner Forestry, Inc. (FCF), protests the rejection of its low bid as nonresponsive for failure to acknowledge an amendment to invitation for bids (IFB) No. R3-04-87-02, issued by the Forest Service for reforestation in the Coconino National Forest, Arizona. FCF contends that its failure to acknowledge the amendment, which it allegedly did not receive, should be waived as a minor informality.

We deny the protest.

The IFB was issued on January 14, 1987, with a February 13 bid opening date, and invited bids on three items. The amendment was issued on January 27, 8 days before FCF mailed its bid, to the 37 firms that requested copies of the solicitation. The amendment incorporated a new, higher wage rate determination under the Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (1982), which increased health and welfare fringe benefit payments by \$.27 an hour.

Twelve bidders responded to the IFB: seven acknowledged the amendment; two responses were "no bids;" and three, including FCF, did not acknowledge the amendment. The contracting

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officer rejected the three bids as nonresponsive for failure to acknowledge a material amendment.

FCF, which was low bidder on one of the items, contends that the \$.27 an hour change in fringe benefits does not affect it. FCF claims that as a worker-owned corporation it distributes 90 percent of contract revenues to workers on the basis of shares owned and hours worked, which amounts exceed the required wages, and it pays its workers more than the minimum wage required by the Davis-Bacon Act, 40 U.S.C. § 276a (1982). FCF contends that its failure to acknowledge the amendment therefore should be waived because it is in the government's best interest to award a contract to the low bidder.

Initially, we point out that a bidder bears the risk of not receiving IFB amendments unless it is shown that the contracting agency made a deliberate effort to exclude the company from competing. TCA Reservations, Inc., B-218615, Aug. 13, 1985, 85-2 C.P.D. ¶ 163. FCF has not so alleged, and the record indicates that amendments were mailed to all potential bidders who requested IFBs.

We have held that the failure to acknowledge an IFB amendment increasing wage rates cannot be cured after bid opening, unless a bidder's employees are covered by a collective bargaining agreement binding the firm to pay wages not less than those prescribed by the Secretary of Labor. ABC Paving Co., B-224408, Oct. 16, 1986, 66 Comp. Gen. ___, 86-2 C.P.D. ¶ 436. The reason is that the prescribed wage rates are mandated by statute, so that if an agency were to give the bidder the opportunity to acknowledge the wage rate amendment after bid opening, the bidder could decide to render itself ineligible for award by choosing not to cure the defect. Because giving the bidder such control over the bid's acceptability would compromise the integrity of the competitive procurement system, the bid must be rejected as nonresponsive unless the bidder already is obligated to pay wages not less than those prescribed. Id.

Although FCF maintains that its owner-employees will receive 90 percent of the contract income after 10 percent has been allocated for administrative expenses, there is nothing in the record indicating that the employees are covered by any binding agreement which would guarantee that the wages paid are not less than those required under the Service Contract Act. Moreover, the fact that FCF may comply with Davis-Bacon Act wage requirements is irrelevant. The Davis-Bacon Act, which covers construction contracts, did not apply here, and FCF's alleged compliance in that regard clearly does not

impose a legal obligation on the firm to comply with the unacknowledged Service Contract Act rates in this particular contract.

FCF's failure to acknowledge the amendment increasing the wage rates therefore cannot be waived as a minor informality, and the Forest Service properly rejected FCF's bid as nonresponsive. The protest is denied.

for *Harry R. Van Cleve*
Harry R. Van Cleve
General Counsel